

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.

Plaintiffs,

v.

TYSON FOODS, INC., et al.

Defendants.

Case No. 4:05-cv-00329-GKF-SAJ

DEFENDANTS' MOTION TO CERTIFY QUESTIONS OF LAW

Pursuant to 20 Okla. Stat. §§ 1601-11 and 28 U.S.C. § 1292(b), Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Cargill, Inc., and Cargill Turkey Production, LLC, respectfully move this Court to certify to the Oklahoma Supreme Court questions of state law raised in their Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations ("Defendants' Constitutional Motion" or the "Motion") (Dkt. No. 1064).

I. BACKGROUND

Defendants' Constitutional Motion raises several complex and important questions of Oklahoma state law, along with a single issue of federal law. In particular, Defendants argue that the manner in which the Oklahoma Attorney General's office is litigating this case violates federal and state due process by impermissibly delegating the State's power to individuals who have a personal financial interest in the exercise of that power. *See* Defendants' Constitutional Motion at 6-15. Defendants also argue that the Oklahoma Attorney General's contingency fee contract with private counsel for the state violates the separation of powers in Oklahoma's Constitution, which vests the legislature with exclusive power to expend state funds and expressly prohibits any state official from contracting to expend funds beyond the State's current fiscal year, regardless of the source of those funds. *Id.* at 16-22; Reply at 8-9 (Dkt. No. 1113); Okla. Const. art. X, § 23 ("The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency thereof,

regardless of its form or the source of money from which it is to be paid,” except through the constitutionally-enumerated legislative budget process).

At the June 15, 2007, hearing, the Court raised the possibility of certifying these significant issues to the Oklahoma Supreme Court.

THE COURT: Let me throw this out. Given that there is no *Clancy* in Oklahoma and because it’s clear that this matter will go on for some time even if we proceed at all deliberate speed, what of certifying a question to the Oklahoma Supreme Court to certify these issues that are framed in this motion?

MR. JORGENSEN: I think it’s a good idea.

THE COURT: And, I’ll ask the same of the general.

MR. JORGENSEN: To the extent you have any question or any desire to proceed, that would be a proper procedure since it would be an issue of state law.

Mot. Hr’g Tr. 93:8-24, June 15, 2007.

Both the Defendants and the State said that they would not object to certification, though the Oklahoma Attorney General stated that the State would only agree to certification if the proceedings before the Oklahoma Supreme Court did not delay the ongoing litigation in this Court.

MR. EDMONDSON: . . . So we don’t think that there is a genuine bona fide dispute as to the law.

However, if it will not delay these proceedings, we don’t have a strenuous objection to submitting that question to the Supreme Court and have no doubt as to what the answer is going to be.

Id. at 119:1-6.

As demonstrated below, certifying the state-law questions is appropriate and will not delay proceedings in this Court. Indeed, certifying these questions will allow the

Oklahoma Supreme Court to determine the meaning of the State's constitution and statutes and will remove the risk that this case will be litigated to conclusion only to have the result overturned because of issues of state law that could have been answered definitively by the Oklahoma courts. As this Court noted at the hearing, "this issue isn't going to go away," *id.* at 128:11, until the Oklahoma Supreme Court is allowed to address these issues that are uniquely within its expertise and authority.

II. LEGAL STANDARD

Under Oklahoma's Uniform Certified Question of Law Act, 20 Okla. Stat. §§ 1601-11, "[t]he [Oklahoma] Supreme Court . . . may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the [Oklahoma] Supreme Court . . . constitutional provision, or statute of [Oklahoma]." *Id.* at § 1602. "Whether to certify a question of state law to the state supreme court is within the discretion of the federal court." *Oliveros v. Mitchell*, 449 F.3d 1091, 1093 (10th Cir. 2006); *Boyd Rosene & Assocs., Inc. v. Kan. Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Federal courts examine at least two factors in determining whether to certify a question of state law. First, courts consider if certification will serve principles of federalism by respecting the role of state courts, which are the final authorities on the meaning of their state's law. *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)); *Fisher v. Civil Service Comm'n of Salt Lake City, Utah*, 484 F.2d 1099, 1100 (10th Cir. 1973). Second, courts have recognized that certification can preserve the resources of litigants and the courts by avoiding

unnecessary proceedings and potential re-trials based on misapprehensions of the meaning of state law. Both of these factors favor certification of the issues raised in Defendants' Constitutional Motion. As the Tenth Circuit has emphasized, "[w]hen used properly, certification 'save[s] time, energy, and resources, and helps build a cooperative judicial federalism.'" *Boyd Rosene & Assocs.*, 178 F.3d at 1365 (quoting *Lehman Bros.*, 416 U.S. at 391).

II. ARGUMENT

A. This Court Should Certify to the Oklahoma Supreme Court Issues of Due Process and the Separation of Powers Under the Oklahoma Constitution

The Defendants' Constitutional Motion raises significant issues of state law. Specifically, the contingency fee contract authorizes the private attorneys hired by the Oklahoma Attorney General to represent the State in these proceedings and promises them a substantial portion of any recovery the State may obtain. *See* Dkt. No. 1064 at 2. It is well established that government lawyers, including private attorneys under contract to represent the government, have a due-process obligation of impartiality when discharging their duties. *See id.* at 8-9. The contract between the Oklahoma Attorney General and the private attorneys violates this obligation by conferring on the private attorneys the State's power and promising them a substantial percentage of any recovery. *See id.* at 10-15.

The Oklahoma Constitution indicates such an arrangement is illegal under State law because it violates both due process and the State's separation of powers. *See* Okla. Const., art. II, § 7. Indeed, the Oklahoma Constitution expressly grants the state Legislature exclusive control over the state treasury. *See id.*, art. V, § 55. The state

constitution likewise prohibits state officers from entering into any agreement purporting to bind the use of yet-unreceived monies in future fiscal years. *See id.*, art. X, § 23 (the “Balanced Budget” provision). Remarkably, the Attorney General has argued that the funds he may recover in this case do not become state resources until after he deducts whatever portion he chooses to pay the private attorneys. Resp to Defendants’ Constitutional Motion at 21-23. According to the Attorney General, only after he pays his private attorneys does the remainder of any recovery or settlement become the property of the State. *Id.* Nonetheless, the Attorney General conceded that all of his office’s litigation receipts are held by the state treasury. Mot. Hr’g Tr. 115-19. More importantly, Article 10, section 23, of the Oklahoma Constitution expressly provides that no state official can enter into multi-year contracts to spend money regardless of the source of the funds. Accordingly, because the contract between the Attorney General and the private attorneys, signed without any Legislative oversight in July 2004, obligates the Attorney General to an open-ended debt, it contravenes the Oklahoma Constitution’s separation-of-powers provisions. *See also* Dkt. No. 1064 at 18-22.

As this Court suggested at the June 15 hearing, the Oklahoma Supreme Court should have the opportunity conclusively to resolve such significant issues of state law. *See Delta Funding Corp. v. Harris*, 466 F.3d 273, 273 n.1 (3d Cir. 2006) (“The certified question procedure is a useful vehicle for federal courts to give the state supreme courts an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue.”); *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1136 (11th Cir. 2006) (“When significant doubt exists about the answer to a material state law question upon which the case turns, a federal court should certify that

question to the state supreme court in order to avoid unnecessary speculation.”); *Fashion Valley Mall, LLC v. N.L.R.B.*, 451 F.3d 241, 242 (D.C. Cir. 2006) (“Because the underlying question is one of state law as to which we can only speculate, we certify that question to the Supreme Court of California for an authoritative answer.”); *State Farm Mut. Auto Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) (“[C]ertification is appropriate when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where the resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.”).

Allowing the Oklahoma Supreme Court to answer these questions is appropriate under every principle that courts consider in the certification analysis. Certification will serve judicial economy by potentially saving the parties and this Court precious time and resources by clarifying a question of law that could continue to hang over the case throughout trial and appeal. Certification will not delay the proceedings in this Court as discovery is ongoing and trial is not scheduled until 2009 at the earliest. The Defendants do not seek a stay of discovery. Certification is also appropriate because the proper management of the State’s resources and compliance with the State’s constitutional limitations on contingency fee counsel are “matter[s] of vital public concern” that “will likely recur in other cases.” *State Farm*, 275 F.3d at 672. As this Court noted, “this issue isn’t going to go away.” Mot. Hr’g Tr. 128:11. Certification will allow the Oklahoma Supreme Court to provide guidance for future contracting between the government and private actors.

Therefore, Defendants respectfully request that this Court certify to the Supreme Court of Oklahoma the following questions:

(1) Whether the contingency fee contract between the Oklahoma Attorney General and private attorneys in this case violates due-process principles under the Oklahoma Constitution by authorizing the attorneys to represent the State in a legal proceeding and entitling them to a substantial amount of the damages the State may recover.

(2) Whether the contingency fee contract between the Oklahoma Attorney General and private attorneys in this case violates the separation-of-powers provisions of the Oklahoma Constitution by authorizing the attorneys to represent the State in a legal proceeding and entitling them to a substantial amount of the damages the State may recover, regardless of when it recovers those damages.

B. Because the Contingency Fee Contract Also Implicates Due Process Principles Under the U.S. Constitution, Certifying a Due-Process Question to the Tenth Circuit is Appropriate

In addition to due-process and separation-of-powers issues under the Oklahoma Constitution, Defendants' Constitutional Motion also raises a due process claim under the U.S. Constitution. *See* Dkt. No. 1064 at 6-15. Accordingly, if this Court certifies to the Oklahoma Supreme Court the state-law questions discussed above, Defendants respectfully request that the Court also certify to the Tenth Circuit the question whether the contingency fee contract violates due process under the federal constitution. Although certifying the federal issue as an interlocutory matter is not necessary to certify the state-law issues to the Oklahoma Supreme Court, granting an interlocutory appeal while the companion state issues are being analyzed by the Oklahoma courts would promote judicial economy. Interlocutory certification of the federal issue, rather than Defendants appealing it after the proceedings in this Court are concluded would be appropriate under 28 U.S.C. § 1292(b).

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Id. Whether the contract violates federal due process is an issue that may materially affect the prosecution of this case. Without private financial interests, the likelihood of a settlement or other resolution in the public interest will increase dramatically. Such considerations are appropriate reasons to certify this issue for interlocutory appeal, especially where the companion state-law issues have already been certified. *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (“A question of law may be deemed ‘controlling’ if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so.”).

Therefore, Defendants respectfully request that this Court certify to the Tenth Circuit the following question:

Whether the contingency fee contract between the Oklahoma Attorney General and private attorneys in this case violates due-process principles under the U.S. Constitution by authorizing the attorneys to represent the State in a legal proceeding and entitling them to a substantial amount of the damages the State may recover.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court certify the two issues of state law discussed above to the Oklahoma Supreme Court. Although not essential to certifying the issues of state law, Defendants also submit that the Court should certify the companion federal issue for interlocutory appeal.

Dated: July 23, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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